

1971

# Corporations in Conflict--The Tender Offer by Douglas V. Austin and Jay A. Fishman

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## Recommended Citation

Bishop, Joseph W. Jr. (1971) "Corporations in Conflict--The Tender Offer by Douglas V. Austin and Jay A. Fishman," *Kentucky Law Journal*: Vol. 60 : Iss. 2 , Article 12.

Available at: <https://uknowledge.uky.edu/klj/vol60/iss2/12>

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are dealt with and the section is concluded with the problem of abortion and its legal treatment.

The material selected is somewhat parochial and the authors seem to prefer cases from the Washington, D.C., Maryland and Virginia areas. The depth of consideration of the particular problem is at times thorough and at times cursory. Nevertheless, the collection of materials is valuable in that the right questions are asked. Acceptable answers are quite another problem.

In this rapidly developing field, the ability to recognize the right questions and properly formulate the basic issues is an attribute which must be developed. One derives the distinct impression that a medical student having been subjected to these materials with classroom instruction will have a better appreciation of the law and of his fellow professional practitioner, the lawyer, in the total service of providing adequate care on a competent basis to the consumer to whom the service is necessary and vital in the extreme. The critical areas in need of re-examination are spotlighted. The best answers will develop if cooperation between the two professions on a basis of mutual respect is achieved. The approach of this case book encourages that very development.

*Judge Scott Reed\**

CORPORATIONS IN CONFLICT—THE TENDER OFFER. By Douglas V. Austin and Jay A. Fishman. Ann Arbor, Michigan: Masterco Press. 1970. Pp. viii, 205.

There is nothing new about the takeover bid. It is an effort by persons outside a corporation, or insurgents within it, to oust its management and seize control. In the history of these wars the Homeric epic is Commodore Cornelius Vanderbilt's siege in 1868 of the Erie Railway, whose capture he deemed necessary to eliminate the threat of competition to his New York Central. Vanderbilt's technique, the use of his own millions to purchase on the open market all the Erie stock available, was crude, but it would have worked had there been

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any limit on the quantity of stock available. But, there was not. An obscure statute<sup>1</sup> authorized railroad companies to issue unlimited amounts of bonds convertible into common stock—or at least, as construed by the directors of the Erie Railway, Messrs. Daniel Drew, Jim Fisk and Jay Gould, it did. The directors possessed a printing press; it held up nobly and the more Erie Common Vanderbilt purchased, the more there was for sale. The combat, splendidly chronicled by Charles Francis Adams, Jr.,<sup>2</sup> was ultimately settled by treaty, naturally at the expense of the public. Hardly less dramatic was the sudden onslaught by Edward H. Harriman, Lord of the Union Pacific Railroad (and father of the Polonius of the Democratic Party), on James H. Hill's Northern Pacific, likewise carried out by huge purchases of Northern Pacific on the open market. Harriman had the backing of Jacob Schiff and Kuhn Loeb; Hill's protecting deity was the elder J. P. Morgan. The head-on collision of these giants shook Wall Street; on May 9, 1901, the price of Northern Pacific rose from 170 to 700.<sup>3</sup>

Modern finance has few such titans, able to gain control of large, publicly held enterprises by the exercise of brute financial power. Moreover, such modern statutes as the federal securities laws would interfere with the free play of the sort of genius possessed by Drew, Fisk and Gould. In the fifties and early sixties of the present century the proxy fight came into fashion—an effort to persuade the stockholding electorate of a corporation, typically one whose management had been less than brilliant (such as Montgomery Ward or the New York Central),<sup>4</sup> to turn the rascals out. In these contests both sides hired professional solicitors and public relations firms, filling the mails and the media with fervent denunciations, often truthful, of each other's motives. Sometimes the outsiders, always described as "raiders" by incumbent management, actually won and sometimes the stockholders may have been a bit the better for the change.

Proxy contests, although by no means so extinct as the authors of *CORPORATIONS IN CONFLICT* seem to think,<sup>5</sup> have serious disadvantages. The greatest risk is that the large sums expended may be completely wasted if the election is lost. This risk is perhaps less serious than

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<sup>1</sup> Section 28 (10) of the New York General Railroad Act of 1850 (repealed).

<sup>2</sup> C. ADAMS, JR. and H. ADAMS, *CHAPTERS OF ERIE AND OTHER ESSAYS* (1886).

<sup>3</sup> See 2 M. SULLIVAN, *OUR TIMES*, 360-70 (1927).

<sup>4</sup> But in the light of recent events in the Eastern District of Pennsylvania the old management of the Central doesn't look too bad, at that.

<sup>5</sup> They are still reported with some frequency in the commercial press. Since the publication of *Tender Offer*, Twentieth Century-Fox, GAF, Midas International, Shattuck Denn Mining, TelePrompter and Universal Container, among others, have been involved in proxy fights. See *Wall Street Journal*, May 14, 1971, at 32, col. 1; Nov. 16, 1971, at 4, col. 2.

Messrs. Austin and Fishman suggest. The winners, of course, invariably pay their bills out of the corporate fisc. The losers, by threatening to litigate the propriety of such a use of the company's assets, not infrequently secure a compromise whereby the bills of both factions are picked up by the corporation.<sup>6</sup> But the lawfulness of using the company's money for such purposes is unclear,<sup>7</sup> and there is always the chance that a cantankerous stockholder, not affiliated with either party, will bring a derivative suit against both of them. Moreover, since 1956, the propaganda of the outsiders as well as the management has been subject to SEC policing, which of course, increases the possibilities of litigation and expense.

A technique for acquiring corporate control which came into fashion in the sixties, and which is the subject of the book, is the tender offer—a public offer to purchase either all the outstanding stock, or enough of it to give the purchaser control, in exchange for cash (in an amount somewhat above the market price of the stock) or securities of the offeror. The former takes money, of course, but the purchaser usually expects to recoup his investment and/or pay off those who have lent the cash with the assets and earnings of the captured business. Since the offeror's agreement to purchase any of the stock which is tendered is typically conditioned on enough being tendered to give him control, the risk of failure is limited to the costs of making the offer (via newspaper ads or, if the offeror can obtain a list of stockholders, direct mail) plus the cost of obtaining necessary commitments from lenders.

This technique has proven very effective<sup>8</sup> and has grown in popularity. I suspect that cash tender offers have been somewhat less common in the last couple of years than during the period surveyed by the authors. Some chilling effect may have been exercised by the enactment in 1968 of a bill introduced by Senator Harrison A. Williams, which amended section 13 and 14 of the Securities Exchange Act of 1934 to require that cash tender offerors<sup>9</sup> disclose to stockholders their identities and business histories, the source of the cash to be paid and their plans for the target company if the offer is successful. It also requires that cash tender offers give the offerees certain substantial advantages, notably by providing that, if an offeror ups his

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<sup>6</sup> Cf. *e.g.*, *Rosenfeld v. Fairchild Engine and Airplane Corp.*, 309 N.Y. 168, 128 N.E.2d 291 (1955).

<sup>7</sup> See generally E. ARANOW and H. EINHORN, *PROXY CONTESTS FOR CORPORATE CONTROL* (2d ed. 1968).

<sup>8</sup> The authors report that in the period 1956-1967 almost two-thirds of the 370 tender offers studied were successful. p. 59.

<sup>9</sup> Where securities were offered in exchange for the stock of a publicly held company, the Securities Act of 1933 already required full disclosure through the filing of a registration statement.

bid to attract more tenders, those who have already tendered their shares must be given the benefit of this sweetening. But, it is probable that scarcity of money has been the major reason for any decline in the number of cash tender offers.

The eminently pragmatic purpose of *CORPORATIONS IN CONFLICT* is to offer both to takeover bidders and their targets a *vade mecum* on offensive and defensive strategy. To this end the authors have analyzed and described a large number of actual battles and backed them up with no less than 47 tables, many of them highly illuminating. Of particular interest is the chapter describing the qualities which make a corporation a tempting target,<sup>10</sup> such as earnings which are good but below those of other companies in the industry and dividends which are low in relation to earnings—in brief, a company whose management has shown more than average concern for itself and less than average for the stockholders. Their chapter on the ingredients of a successful defense<sup>11</sup> is frank to the point of cynicism; they counsel, for example, a prompt announcement of an increase in dividends or, if cash cannot be found, the use of stock splits or stock dividends to create an illusion of benefit to the stockholders; the use of temporary injunctions obtained on more or less phony grounds; and the free use of *suggestio falsi* and *suppressio veri* in the management's propaganda. And, in fact, all of these techniques (and others still more dubious) have been employed by beleaguered managements, sometimes successfully.

Messrs. Austin and Fishman are not lawyers and their chapter on the applicable law<sup>12</sup> is both inadequate and unreliable. Derivative suits, for example, are in better, not worse, judicial repute than they used to be.<sup>13</sup> They are a very effective method of calling to account, managements who breach their fiduciary duty by self-dealing of one kind or another. They have never been an effective method of reforming the sort of merely inert and incompetent managements who make such inviting targets for the takeover bidder, because the so-called business judgment rule has generally served as a bar to liability. The authors do not mention the major legal problem of the takeover bid, which is management's use of the corporation's money to buy its own stock at fancy prices—thereby reducing the equity of the remaining stockholders—either to keep the stock out of the hands of the bidder or to buy him out.<sup>14</sup>

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<sup>10</sup> Pp. 43-57.

<sup>11</sup> Pp. 121-39.

<sup>12</sup> Pp. 25-41.

<sup>13</sup> See e.g., *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966).

<sup>14</sup> Cf. e.g., *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964).

Similarly, their summary of the Williams bill,<sup>15</sup> which seems to have been hastily composed and inserted after the book had gone to press,<sup>16</sup> is most inaccurate. But, their criticism of the policy embodied in the bill is sound. The disclosure requirement in the bill is predicated on an analogy to exchange tender offers and proxy fights which is thoroughly and demonstrably false. Where the stockholder need not leave any of his money in the hands of the would-be new management, but may retire with more cash than he could get on the open market, the considerations which justify disclosure are not applicable, although they are when he is not given the chance to sell out entirely. There is small doubt that the prime purpose of the act was less to protect public investors than to protect entrenched and frequently incompetent managements.<sup>17</sup> The cash tender offeror, unlike other takeover bidders, is putting his money where his mouth is.

Overall, the book, despite its deficiencies (which include the lack of an index), ought to be useful to those who may be involved in tender offers, and to students of business and business history. I have of late years fallen into the habit of reviewing bad, pretentious books. It is refreshing to review one which is neither.

Joseph W. Bishop, Jr.\*

**AUTOMOBILE DESIGN LIABILITY.** By Richard M. Goodman. Rochester, New York: Lawyers Co-Operative Publishing Co., 1970. Pp. 1087. \$35.00.

Many books have been written in the personal injury field dealing with the legal aspects of such cases or with the trial tactics and techniques which should be used for adequate presentation to a jury. Rarely, however, does one find a book that is designed to furnish the practitioner with the basic tool of the successful trial lawyer—a clear understanding of the technical facts of the case and where to acquire it.

Dean A. Robb, Esq. of the Michigan Bar wrote such a book in 1965 (*LAWYER'S DESK REFERENCE*, Lawyers Cooperative Publishing Co.) and now his partner, Richard M. Goodman has followed in his footsteps.

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<sup>15</sup> Pp. 34-35.

<sup>16</sup> They forgot to delete statements in an earlier chapter (pp. 4-5) that cash tender offers are not subject to regulation.

<sup>17</sup> See H. Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 *DUKE L.J.* 231.

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